

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**T.S., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
Buffalo, NY, Employer**

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**Docket No. 21-1376  
Issued: April 8, 2022**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REVERSING CASE**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

On September 14, 2021 appellant filed a timely appeal from an August 6, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> The Clerk of the Appellate Boards docketed the appeal as No. 21-1376.

On June 29, 1993 appellant, then a 33-year-old temporary carpenter, filed a traumatic injury claim (Form CA-1) alleging that on that date he strained his left knee when he depressed the foot pedal of a metal shear while in the performance of duty. OWCP initially accepted this claim for left knee strain, and on April 10, 2013 expanded acceptance of the claim to include tear of the left medial meniscus, and osteoarthritis of the right lower leg. On February 16, 2016 it further expanded acceptance of his claim to include consequential dental and somatoform disorders. Appellant was terminated from the employing establishment on March 31, 1994. He

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<sup>1</sup> The Board notes that, following the August 6, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

was rehired on November 13, 1994 and stopped work on August 14, 1995. OWCP paid appellant wage-loss compensation on the periodic rolls as of August 14, 1995.<sup>2</sup>

On June 9, 2019 OWCP received a completed FERS/SSA dual benefits form from SSA, which reported that appellant had been in receipt of SSA age-related retirement benefits since April 20, 2016. The form listed his SSA age-related retirement benefit rates with FERS and without FERS as follows: beginning April 2016, his monthly SSA rate with FERS was \$1,067.30 and without FERS was \$786.40; beginning December 2016, his monthly SSA rate with FERS was \$1,070.50 and without FERS was \$788.70; beginning December 2017, his monthly SSA rate with FERS was \$1,091.90 and without FERS was \$804.40; beginning December 2018, his monthly SSA rate with FERS was \$1,122.40 and without FERS was \$826.90; beginning December 2019, his monthly SSA rate with FERS was \$1,140.30 and without FERS was \$840.10; and beginning December 2020 his monthly SSA rate with FERS was \$1,155.10 and without FERS was \$851.00.

OWCP completed a FERS offset overpayment calculation worksheet on June 17, 2021. It determined the overpayment amount by multiplying the daily FERS offset amount by the number of days in each period from April 1, 2016 through May 22, 2021, which resulted in a total overpayment of \$19,147.48. The form indicated that: from April 1 through November 30, 2016, appellant received an overpayment in the amount of \$2,259.55; from December 1, 2016 through November 30, 2017, appellant received an overpayment in the amount of \$3,390.89; from December 1, 2017 through November 30, 2018, appellant received an overpayment in the amount of \$3,459.48; from December 1, 2018 through November 30, 2019, appellant received an overpayment in the amount of \$3,555.74; from December 1, 2019 through November 30, 2020, appellant received an overpayment in the amount of \$3,622.19; and from December 1, 2020 through May 22, 2021 appellant received an overpayment in the amount of \$2,859.63

On June 17, 2021 OWCP issued a preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$19,147.48 because he received FECA wage-loss compensation benefits concurrently with SSA age-related retirement benefits for the period April 1, 2016 through May 22, 2021 for which he was without fault. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support his reported income and expenses. Additionally, OWCP provided an overpayment action request form and advised appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record or request a prerecoupment hearing.

In an overpayment action request form dated July 15, 2021, appellant requested waiver of recovery of the overpayment. He also requested that OWCP make a decision based on the written evidence. Appellant provided the first page of a Form OWCP-20.

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<sup>2</sup> By decision dated February 4, 1997, OWCP issued a retroactive loss of wage-earning capacity (LWEC) decision finding that the position of carpenter fairly and reasonably represented appellant's wage-earning capacity with no loss of earnings. Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated August 27, 1997, the hearing representative reversed the February 4, 1997 LWEC decision. OWCP reentered appellant on the periodic rolls.

By decision dated August 6, 2021, OWCP finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$18,032.12<sup>3</sup> for the period April 1, 2016 through May 22, 2021. It found that he was without fault in the creation of the overpayment. OWCP denied waiver of recovery of the overpayment as appellant had not fully completed the Form OWCP-20 nor provided supporting financial documentation, so that there was insufficient evidence to establish that recovery would defeat the purpose of FECA or be against equity and good conscience. It required recovery of the overpayment by deducting \$650.83 every 28 days from appellant's continuing compensation payments beginning September 12, 2021.

The Board, having duly considered this matter, finds that OWCP failed to properly develop the underlying issue of whether appellant's SSA age-related retirement benefits were attributable to federal employment.<sup>4</sup>

OWCP's procedures provide that an overpayment occurs when FECA compensation is not reduced by the FERS offset amount. Since the SSA will not report an offset amount until after SSA benefits are received, an overpayment will almost always occur and will need to be calculated for each period in which the offset amount was not withheld from compensation.<sup>5</sup> The offset provision of 5 U.S.C. § 8116(d)(2) and applicable regulations apply to SSA age-related retirement benefits that are attributable to federal service.<sup>6</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA age-related retirement benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>7</sup> In identifying the fact and amount of an overpayment of compensation following a claimant's receipt of SSA age-related retirement benefits, the Board has observed that OWCP uses a FERS Offset Calculation Worksheet.<sup>8</sup> This calculation worksheet is sent to SSA and the completed form is returned to OWCP setting forth purported SSA calculations as to the effective date and rate of SSA benefits without FERS and the effective date and rate of SSA benefits with FERS.<sup>9</sup> Following

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<sup>3</sup> The Board notes that OWCP indicated that the overpayment amount was \$18,032.71. However, this appears to be a typographical error as OWCP's detailed calculations show an overpayment of \$18,032.12.

<sup>4</sup> See *Order Reversing Case, D.S.*, Docket No. 21-0305 (issued November 12, 2021); *Order Reversing Case, C.T.*, (J.T.), Docket No. 21-0153 (issued July 21, 2021); *Order Reversing Case, W.G.*, Docket No. 20-1389 (issued June 30, 2021); *Order Reversing Case, R.L.*, Docket No. 20-1333 (issued May 13, 2021); *J.L.*, Docket No. 19-1806 (issued July 29, 2020); *A.C.*, Docket No. 19-0174 (issued July 9, 2019).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1(h), (September 2018).

<sup>6</sup> See 5 U.S.C. § 8116(a), (d); 20 C.F.R. § 10.421(a).

<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

receipt of the purported SSA calculations, a preliminary determination of overpayment is issued if a prohibited dual benefit was received.<sup>10</sup>

The Board has observed, however, that not all federal employees are enrolled in FERS.<sup>11</sup> Some FECA claimants are enrolled in another retirement program, such as the CSRS. Other federal employees are not entitled to be enrolled in a federal retirement program. Therefore, OWCP's procedures with regard to requesting offset information are not applicable to all recipients of FECA compensation and SSA age-related retirement benefits. As such, the information solicited on the FERS Offset Calculation Worksheet that OWCP sends to SSA is not applicable to non FERS claimants and does not establish either the fact or amount of an overpayment.

Herein, the evidence of record does not establish that appellant was covered under FERS. Rather, the documents of record establish that appellant was not under a federal retirement program. His March 2, 1999 Notification of Personal Action (Form SF-50) notes that appellant was a temporary employee covered only under the Federal Insurance Contributions Act (FICA). As OWCP has not established that he concurrently received SSA age-related retirement benefits, based in part on his service, and FECA disability compensation with appropriate offset, it has not established that he received an overpayment of compensation in the amount of \$18,032.12 for the period April 1, 2016 through May 22, 2021. The Board, therefore, finds that the August 6, 2021 decision must be reversed.<sup>12</sup>

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<sup>10</sup> *J.L., supra* note 4.

<sup>11</sup> *See Order Reversing Case, W.G., supra* note 4.

<sup>12</sup> *See Order Reversing Case, R.L., supra* note 4; *see also W.G., supra* note 4.

**IT IS HEREBY ORDERED THAT** the August 6, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 8, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board